Nos. 77-10, 77-11, 77-12, 77-47, 77-64

IN THE

Supreme Court of the United States

OCTOBER TERM, 1977

Supreme Court, U. S.
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EXXON CORPORATION, *et al.*, *Appellants,*

v.

GOVERNOR OF THE STATE OF MARYLAND, *et al.*,
Appellees.

On Appeal from the Court of Appeals
of Maryland

BRIEF OF AMICI CURIAE

FILED ON BEHALF OF CHAMPLIN PETROLEUM COMPANY, CITIES SERVICE OIL COMPANY, GETTY REFINING AND MARKETING COMPANY, KERR-McGEE CORPORATION, KOCH REFINING COMPANY, MARATHON OIL COMPANY, THE STANDARD OIL COMPANY (OF OHIO), SUNMARK INDUSTRIES, A DIVISION OF SUN OIL COMPANY OF PENNSYLVANIA, TENNECO OIL COMPANY AND TESORO PETROLEUM CORPORATION.

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TABLE OF CONTENTS

Page

INTEREST OF AMICI CURIAE 1

SUMMARY OF ARGUMENT 7

ARGUMENT 9

I. THE MARYLAND ACT IS INVALID UNDER THE COMMERCE CLAUSE 9

A. The Maryland Act Discriminates Against Interstate Commerce 9

B. The Maryland Act Burdens Interstate Commerce 12

C. The Maryland Act's Discrimination Against and Burden on Interstate Commerce Cannot Be Justified on the Basis of Local Benefits 14

1. The local interest is illegitimate 14

2. The local interests are outweighed by the burden on interstate commerce 15

3. There are less restrictive alternatives 16

D. The Maryland Act Regulates Interstate Commerce in an Area in Which There is a Need for National Uniformity of Regulation 17

II. PARAGRAPH (f) OF THE MARYLAND STATUTE IS PREEMPTED BY THE FEDERAL EMERGENCY PETROLEUM ALLOCATION ACT OF 1973, BY VIRTUE OF THE SUPREMACY CLAUSE OF THE UNITED STATES CONSTITUTION 20

A. Under This Court's Decisions, Paragraph (f) is Preempted by the Supremacy Clause 20

1. Congress has occupied the field 21

2. Paragraph (f) stands as an obstacle to the accomplishment of the full purposes of Congress 23

Page

B. The Language of § 755(b) Does Not Make Preemption Inapplicable 26

1. The Court of Appeals incorrectly construed § 755(b) 26

2. Even if the Maryland court's construction of § 755(b) were correct, paragraph (f) is nevertheless preempted 29

3. There are actual conflicts between paragraph (f) and the EPAA 31

III. The Maryland Court of Appeals Erred In Its Determination of the Scope of Section 2(b) of the Robinson-Patman Act and of the Compatibility of That Act With Paragraph (d) of the Maryland Statute 32

A. Section 2(b) of the Robinson-Patman Act was Incorrectly Interpreted by the Court Below ... 32

B. Paragraph (d) of the Maryland Statute Conflicts with the Robinson-Patman Act, and Is Therefore Preempted 36

Conclusion 41

TABLE OF AUTHORITIES

Cases:

Air Transport Ass'n of America v. *FEO*, 520 F.2d 1339 (Emer. Ct. App. 1975) 21
Atlantic Richfield Co. v. *Tribbitt*, Case Nos. 4692, 4774 (Ct. of Chancery, New Castle County, Delaware, August 25, 1977) 10
Baldwin v. *G.A.F. Seelig, Inc.*, 294 U.S. 511 (1935) 17
Bargain Car Wash, Inc. v. *Standard Oil Co. (Indiana)*, 466 F.2d 1163 (7th Cir. 1972) 33, 34, 35, 39
Best & Co. v. *Maxwell*, 311 U.S. 454 (1940) 11
Bunty v. *Shell Oil Co.*, 1972 Trade Cases (CCH) ¶ 74,252 (D.Nev. 1972) 34
Cadigan v. *Texaco, Inc.*, 492 F.2d 383 (9th Cir. 1974) .. 39
Campbell v. *Hussey*, 368 U.S. 297 (1961) 21

Page

City of Burbank v. *Lockheed Air Terminal, Inc.*, 411 U.S. 624 (1973) 21, 22
Condor Operating Co. v. *Sawhill*, 514 F.2d 351 (Emer. Ct. App.), *cert. denied*, 421 U.S. 976 (1975) 21
Covey Oil Co. v. *Continental Oil Co.*, 340 F.2d 993 (10th Cir.), *cert. denied*, 380 U.S. 964 (1965) 34
Dean Milk Co. v. *Madison*, 340 U.S. 349 (1951) 10, 11
DeCanas v. *Bica*, 424 U.S. 351 (1976) 21, 27, 30
Enterprise Industries v. *Texas Co.*, 136 F. Supp. 420 (D.Conn. 1955), *reversed on other grounds*, 240 F.2d 457 (2d Cir.), *cert. denied*, 353 U.S. 965 (1957) 33, 34, 35, 36, 37, 38
Exquisite Form Brassiere, Inc. v. *FTC*, 360 F.2d 492 (D.C. Cir. 1965), *cert. denied*, 384 U.S. 959 (1966) 39
Exxon Corp. v. *Conner*, Case No. 74-1449 (Cir. Ct., 2d Jud. Cir., Leon County, Florida, January 23, 1975) 10
Florida Lime and Avocado Growers, Inc. v. *Paul*, 373 U.S. 132 (1963) 26, 40
Forster Mfg. Co. v. *FTC*, 335 F.2d 47 (1st Cir. 1964), *affirmed after remand*, 361 F.2d 340 (1st Cir. 1966), *cert. denied*, 385 U.S. 1003 (1967) 39
Foster-Fountain Packing Co. v. *Haydel*, 278 U.S. 1 (1928) 14
FTC v. *A. E. Staley Mfg. Co.*, 324 U.S. 746 (1945) 39
FTC v. *National Lead Co.*, 352 U.S. 419 (1957) 39
FTC v. *Procter & Gamble Co.*, 386 U.S. 568 (1967) 12
FTC v. *Sun Oil Co.*, 371 U.S. 505 (1963) 13, 35, 37, 39
Garner v. *Teamsters Union*, 346 U.S. 485 (1953) 22, 24
Gray v. *Shell Oil Co.*, 469 F.2d 742 (9th Cir. 1972), *cert. denied*, 412 U.S. 943 (1973) 34
Great Atlantic & Pacific Tea Co. v. *Cottrell*, 424 U.S. 366 (1976) 14
Hampton v. *Graff Vending Co.*, 478 F.2d 527 (5th Cir.), *cert. denied*, 414 U.S. 859 (1973) 39
Hines v. *Davidowitz*, 312 U.S. 52 (1941) 21, 23, 38
H. P. Hood & Sons, Inc. v. *DuMond*, 336 U.S. 525 (1949) 14, 19
Hunt v. *Washington State Apple Advertising Comm.*, decided June 20, 1977 .....10, 12, 13, 16
Huron Portland Cement Co. v. *Detroit*, 362 U.S. 440 (1960) 18
Ingram v. *Phillips Petroleum Co.*, 259 F.Supp. 176 (D. N.M. 1966) 17

Page

Jones v. *Rath Packing Co.*, 430 U.S. 519 (1977) ...23, 29, 30
Katzenbach v. *McClung*, 379 U.S. 294 (1964) 13
Leisy v. *Hardin*, 135 U.S. 100 (1890) 20
Merrill Lynch, Pierce, Fenner & Smith, Inc. v. *Ware*, 414 U.S. 117 (1973) 27
Morris v. *Duby*, 274 U.S. 135 (1927) 20
Nippert v. *City of Richmond*, 327 U.S. 416 (1946) 11, 13
Perez v. *Campbell*, 402 U.S. 637 (1971) 40, 41
Perez v. *United States*, 402 U.S. 146 (1971) 13
Phillips Petroleum Co., 84 F.T.C. 1666 (1974) 16
Pike v. *Bruce Church, Inc.*, 397 U.S. 137 (1970) 14
Red Lion Broadcasting Co. v. *FCC*, 395 U.S. 367 (1969) 35
Rice v. *Santa Fe Elevator Corp.*, 331 U.S. 218 (1947) .21, 24, 25, 28
San Diego Bldg. Trades Council v. *Garmon*, 359 U.S. 236 (1959) 22, 23, 24
Shell Oil Co. v. *Younger*, 1976-1 Trade Cases (CCH) ¶ 60,960 (N.D.Cal. 1976), *appeal docketed*, No. 76-2784 (9th Cir. Aug. 13, 1976) 10, 40
South Carolina Hwy. Dept. v. *Barnwell Bros.*, 303 U.S. 177 (1938) 19
Southern Pacific Co. v. *Arizona*, 325 U.S. 761 (1945) ..17, 18
Standard Motor Products, Inc. v. *FTC*, 265 F.2d 674 (2d Cir.), *cert. denied*, 361 U.S. 826 (1959) 39
Standard Oil Co. v. *FTC*, 340 U.S. 231 (1951) 14, 32, 37, 39, 40
Standard Oil Co. (Ohio), Dkt. 8910, CCH Trade Reg. Rep. ¶ 20,134 (1972); ¶ 20,208 (1973); ¶ 21,329 (1977) 17
United States v. *Falstaff Brewing Corp.*, 410 U.S. 526 (1973) 12
United States v. *Penn-Olin Chemical Co.*, 378 U.S. 158 (1964) 12
Wickard v. *Filburn*, 317 U.S. 111 (1942) 13

CONSTITUTION, STATUTES AND REGULATIONS:

U.S. Constit., Art. I, § 8, cl. 3 .....9, *passim*
U.S. Constit., Art. VI, cl. 2 .....20, 27, 29
7 U.S.C. § 2051 (Supp. V 1975) 27
15 U.S.C. §§ 1-7 (1970) 37
15 U.S.C. §§ 12-27 (1970) 38

Page

15 U.S.C. §§ 13-13b, 21a .....*passim*
15 U.S.C. § 13(a) 17, 32, 37, 41
15 U.S.C. § 13(b) 6, 7, 8, 17, 32, 33, 34, 35, 36, 37, 38, 39, 40
15 U.S.C. § 45 (1970) 16
15 U.S.C. § 78bb(a) (Supp. V 1975) 27
15 U.S.C. § 751 *et seq.* (Supp. V 1975) .....*passim*
15 U.S.C. § 751(a)(3) 25
15 U.S.C. § 753(b)(1) 21, 31
15 U.S.C. § 754(b) 28
15 U.S.C. § 755(b) 8, 26, 27, 28, 29, 31
15 U.S.C. § 761 (Supp. V 1975) 23, 28
29 U.S.C. § 151 *et seq.* (1970) 13, 22
29 U.S.C. § 201 *et seq.* (1970) 13
Department of Energy Organization Act, Pub. L. No. 95-91, 91 Stat. 565 (1977) 23
Exec. Order No. 11748, 3 C.F.R. 822 (1973) 23
Exec. Order No. 11790, 3 C.F.R. 882 (1974) 23
10 C.F.R. §§ 210-211 (1977) 15
10 C.F.R. §§ 211.1-211.225 20
10 C.F.R. § 211.10 31
10 C.F.R. § 211.15 28
10 C.F.R. § 211.17 28
10 C.F.R. § 211.106 .....21, 31
10 C.F.R. § 211.107(b) 31
41 Fed. Reg. 24518 (1976) 31
Cal. Bus. & Prof. Code § 21200 (Deering) 10
D.C. Law 1-123 (April 7, 1977) 10
Del. Code tit. 6, §§ 2905-2906 (Cum. Supp. 1976) 10
Fla. Stat. Ann. § 526.151 (Supp. 1976) 10

Page

Md. Ann. Code art. 56, § 157B(a) (1972 Repl. Vol., 1976 Cum. Supp.) 24

Md. Ann. Code art. 56, § 157E (1972 Repl. Vol., 1976 Cum. Supp.) .....3, *passim*

Paragraph (b) 3, 4, 9, 15

Paragraph (c) 4, 9, 15

Paragraph (d) 4, 6, 8, 9, 17, 18, 32, 33, 36, 37, 38, 39, 41

Paragraph (f) 4, 6, 8, 15, 20, 23, 24, 29, 31

Md. Com. Law Code Ann. § 11-201 *et seq.* (1975) 16

Md. Com. Law Code Ann. § 11-301 *et seq.* (1975) 16

Md. Com. Law Code Ann. § 11-401 *et seq.* (1975) 16

R.I. Gen. Laws § 5-55-5 (Supp. 1976) 10

MISCELLANEOUS:

Department of Justice, *Report on the Robinson-Patman Act* (1977) 36, 38

The Federal Trade Commission's Report on Anti-competitive Practices in the Marketing of Gasoline, 3 Trade Reg. Rep. (CCH) ¶ 10,373 (1967) 36

Hearings on Gasoline Price War in New Jersey Before a Subcommittee of the Senate Select Committee on Small Business, 84th Cong., 1st Sess., pt. 2 (1955) . 35

H.R. 3370, 95th Cong., 1st Sess., 123 Cong. Rec. H1074 (daily ed. Feb. 9, 1977) 19

H.R. Rep. No. 531, 93d Cong., 1st Sess. (1973) 26

H.R. Rep. No. 628, 93d Cong., 1st Sess. (1973) 21

H.R. Rep. No. 2287, 74th Cong., 2d Sess. (1936) 18, 39

9 Nat'l J. 170-173 (1977) 19

Note, *Pre-emption as a Preferential Ground: A New Canon of Construction*, 12 Stan.L. Rev. 208 (1959), *quoted in* G. Gunther, Cases and Materials on Constitutional Law 359 (9th ed. 1975) 29

Page

Report of the Attorney General's National Committee to Study the Antitrust Laws (1955) 38, 40

S. 795, 95th Cong., 1st Sess., 123 Cong. Rec. S2974 (daily ed. Feb. 24, 1977) 19

S. Rep. No. 1502, 74th Cong., 2d Sess. (1936) 18

Supreme Court Rule 42(1) 7

2A Sutherland, Statutes and Statutory Construction § 46.06 (4th ed. C. Sands 1973) 27

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INTEREST OF AMICI CURIAE

The *amici curiae* are a group of ten companies involved in the petroleum industry: Champlin Petroleum Company; Cities Service Oil Company; Getty Refining and Marketing Company; Kerr-McGee Corporation; Koch Refining Company; Marathon Oil Company; The Standard Oil Company (of Ohio); Sun-

mark Industries, A Division of Sun Oil Company of Pennsylvania; Tenneco Oil Company; and Tesoro Petroleum Corporation. Some of the *amici* engage in petroleum production, refining and marketing;[1] others engage only in petroleum refining and marketing.[2]

No member of the *amici* group engages in petroleum production or refining in Maryland. Indeed, there is not now, and never has been, any petroleum production or refining in Maryland. (App. A, p. 19a.)[3] Several

[1] Champlin Petroleum Company (wholesale marketing in the southwest, southeast and eastern seaboard, retail marketing in the mid-continental states); Cities Service Oil Company (marketing in twenty-seven states east of the Mississippi River); Kerr-McGee Corporation (marketing primarily in the midwest and southwest); Marathon Oil Company (wholesale marketing in the eastern half of the United States, retail marketing in six midwestern states); The Standard Oil Company (of Ohio) (marketing either directly or through subsidiaries in Ohio, Pennsylvania, Michigan, Kentucky, West Virginia, Indiana, New England and the Mid-Atlantic regions); Tenneco Oil Company (marketing primarily in the southeastern and Atlantic seaboard areas); Tesoro Petroleum Corporation (marketing in California, Connecticut, New Jersey, New York and Pennsylvania).

[2] Getty Refining and Marketing Company (marketing in twelve northeastern states under the "Getty" brand name and in the midwest under the "Skelly" brand name). Getty Oil Company, the parent of Getty Refining and Marketing Company, also engages in petroleum production. Koch Refining Company (marketing in 36 states through a subsidiary, Koch Marketing Company). Koch Industries, Inc., a parent company, also engages in petroleum production. Sunmark Industries, A Division of Sun Oil Company of Pennsylvania (marketing in the eastern two-thirds of the United States). Sun Oil Company of Pennsylvania engages in petroleum refining; a related company engages in petroleum production.

[3] References to appendices are to those contained in the joint Appendix filed by Exxon Corporation, the Phillips Petroleum Company, Gulf Oil Corporation, Continental Oil Company and its subsidiary, Kayo Oil Company, Shell Oil Company, Ashland Oil, Inc., Commonwealth Oil Refining Company, Inc., and Petroleum Marketing Corporation accompanying their jurisdictional statements.

members of the *amici* group engage in marketing petroleum products in Maryland through retail service stations, some of which are company operated and some of which are operated by independent dealers.[4] Other members of the *amici* group do not engage in retail marketing of petroleum products in Maryland.[5]

The Maryland statute upheld by the court below directly, substantially and adversely affects the present and future business operations of each member of the *amici* group. Its essential provisions are as follows:[6]

> "(b) After July 1, 1974, no producer or refiner of petroleum products shall open a major brand,

[4] Members of the *amici* group currently marketing petroleum products in Maryland through retail service stations include:

Cities Service Oil Company: 60 retail service stations—34 company operated, 26 dealer operated.

Getty Refining and Marketing Company: 92 retail service stations—all dealer operated as of May 15, 1977.

The Standard Oil Company (of Ohio): BP Oil Inc., a subsidiary, has 72 retail service stations, 61 of which are company-operated, 11 of which are dealer operated. BP Oil Inc. also sells to 32 wholesale distributors, and 20 other retailers.

Sunmark Industries, A Division of Sun Oil Company of Pennsylvania: 264 retail service stations, 9 of which are company-operated, 255 of which are dealer operated. Sunmark expanded the number of company-operated stations in 1975-1976.

Tenneco Oil Company does not now have any retail service station outlets nor any branded operations in Maryland. Tenneco does sell petroleum products to 61 wholesalers in Maryland.

See also Pre-Trial Order, Circuit Court for Anne Arundel County, October, 1975, Tables A and B, at pp. 11-13 for 1974 data on petroleum marketing in Maryland.

[5] Companies which do not presently market petroleum products in Maryland include: Champlin Petroleum Company, Kerr-McGee Corporation, Koch Refining Company, Marathon Oil Company, Tesoro Petroleum Corporation (a subsidiary, Digas Company, operates one retail outlet in Baltimore under an exclusive contract with Memco Stores).

[6] Md. Ann. Code art. 56, § 157E (1972 Repl. Vol., 1976 Cum. Supp.).

secondary brand or unbranded retail service station in the State of Maryland, and operate it with company personnel, a subsidiary company, commissioned agent, or under a contract with any person, firm or corporation, managing a service station on a fee arrangement with the producer or refiner. The station must be operated by a retail service station dealer.

"(c) After July 1, 1975, no producer or refiner of petroleum products shall operate a major brand, secondary brand, or unbranded retail service station in the State of Maryland, with company personnel, a subsidiary company, commissioned agent, or under a contract with any person, firm or corporation managing a service station on a fee arrangement with the producer or refiner. The station must be operated by a retail service station dealer.

"(d) Every producer, refiner, or wholesaler of petroleum products supplying gasoline and special fuels to retail service station dealers shall extend all voluntary allowances uniformly to all retail service station dealers supplied.

* * *

"(f) Every producer, refiner or wholesaler of petroleum products shall apportion uniformly all gasoline and special fuels to all retail service station dealers during periods of shortages on an equitable basis and shall not discriminate among the dealers in their allotments."

Paragraphs (b) and (c) of the Maryland statute prohibit petroleum producers and refiners from opening or continuing to own or operate retail service stations operated by company personnel. These provisions of the statute will force many members of the *amici* group to divest themselves of existing company-operated retail service station outlets for their petroleum products, and will prevent them from open-

ing new retail outlets.[7] Thus, an important avenue for the distribution of petroleum products will be eliminated. Other members of the *amici* group, not currently engaged in retail marketing of petroleum products in Maryland, will be prevented from entering and competing in the Maryland market because the Maryland statute prohibits company-operated retail service stations, which are the only effective means of competition in a field dominated by brand names and established consumer loyalties.[8] No member of the *amici* group can maintain or establish company-operated retail service station outlets to market petroleum products in Maryland as long as it has a petroleum production or refining capacity.

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[7] Members of the *amici* group which market petroleum products in Maryland through company-operated retail service stations and which would be subject to the divestiture provisions of the Maryland statute include: Cities Service Oil Company, The Standard Oil Company (of Ohio) (through a subsidiary, BP Oil Inc.), and Sunmark Industries, A Division of Sun Oil Company of Pennsylvania.

Tenneco Oil Company sells to 61 wholesale customers in Maryland, but has no retail outlets in Maryland. Thus, Tenneco would not be subject to the divestiture provisions of the Maryland statute, but its ability to sell to wholesalers in Maryland might be affected by the uniform allocation and pricing provisions of the statute, which apply to the wholesalers to whom Tenneco sells petroleum products.

[8] Champlin Petroleum Company, Kerr-McGee Corporation, Koch Refining Company, Marathon Oil Company, Tesoro Petroleum Corporation (one outlet of a subsidiary is operated under an exclusive contract with Memco Stores). One member of the *amici* group, Koch Refining Company, has only company-operated retail outlets for its products, and has never had any dealer-operated retail outlets. The Maryland statute, upheld by the court below, entirely precludes Koch from entering the Maryland market.

Paragraph (f) of the Maryland statute requires any member of the *amici* group which enters or remains in the Maryland petroleum retail market to allocate petroleum products uniformly to all retail service station dealers. In the Emergency Petroleum Allocation Act of 1973 (EPAA), 15 U.S.C. § 751 *et seq.*, Congress established its own broad plan for allocating petroleum resources. Paragraph (d) of the Maryland statute requires any member of the *amici* group which enters or remains in the Maryland petroleum retail market to grant voluntary price allowances uniformly to all retail service station dealers throughout the state. Section 2(b) of the Robinson-Patman Price Discrimination Act, 15 U.S.C. § 13(b), requires price discriminations to be extended only on a non-uniform and geographically limited basis. Thus, the Maryland statute requires any member of the *amici* group conducting business in Maryland to operate in ways new and different from the requirements of these two important federal statutes.

The Maryland statute, upheld by the court below, will have profound effects on the nature, scope, distribution and pricing methods of the present and future business operations in Maryland of each member of the *amici* group. Other states have adopted or are considering similar or identical legislation.[9] Therefore, the decision of the court below, because of its potential precedential value, could have significant impact on the business of the *amici* group in some thirty-four jurisdictions other than Maryland. For these reasons, this brief of *amici curiae* is being filed with the consent of the parties to urge this Court to vacate the decision of

[9] *See* notes 10 and 11, at page 10, *infra*.

the court below and to declare the Maryland statute at issue in this case invalid.

The *amici* have obtained written consent of all the parties below to the filing of this brief as *amici curiae* pursuant to Rule 42(1) of the Rules of this Court, and have filed these consents simultaneously with this brief.

SUMMARY OF ARGUMENT

The Maryland statute upheld by the court below violates the Commerce Clause of the United States Constitution. It conflicts with and is preempted by the federal Emergency Petroleum Allocation Act of 1973, 15 U.S.C. § 751 *et seq.* It conflicts with and is preempted by Section 2(b) of the Robinson-Patman Act, 15 U.S.C. § 13(b).

By forbidding the operation or ownership of company-operated retail service stations by petroleum producers, refiners or wholesalers, the statute eliminates an important avenue for the distribution of petroleum products, thus placing an impermissible burden on interstate commerce. The local interest which it was designed to serve is not legitimate, and neither it nor the articulated local ends outweighs the burden on interstate commerce imposed by the statute. Moreover, the statute, and similar legislation adopted or being considered in some thirty-four states other than Maryland, intrudes into an area in which there is a need for uniform national regulation. This statute therefore conflicts with the power granted by the Constitution to the Congress to regulate interstate commerce.

The federal Emergency Petroleum Allocation Act establishes a comprehensive and complex federal pro-

gram to regulate the allocation of petroleum products. Paragraph (f) of the Maryland statute requires the uniform apportionment of petroleum products to all retail service station dealers during times of shortage. The court below concluded that there was no direct conflict between the two, and therefore no preemption of the Maryland statute. This determination is inconsistent with the proper construction of the Emergency Petroleum Allocation Act, § 755(b), and contravenes the policy expressed by Congress in that Act. It also would interpose differing administration in an area where national uniformity is essential to the effectiveness of the Emergency Petroleum Allocation Act. The Maryland statute not only intrudes upon the area regulated by the federal statute but also conflicts with it. It is therefore preempted.

Paragraph (d) of the Maryland statute conflicts with Section 2(b) of the Robinson-Patman Act. The court below concluded that there was no conflict between the two statutes because Section 2(b) did not apply in the circumstances regulated by the Maryland statute. It reached this erroneous conclusion by improperly relying on one—and the minority—interpretation by a lower federal court of the circumstances in which Section 2(b) is available as a defense to sellers making price differentials among buyers. Moreover, even if the interpretation of Section 2(b) relied on by the court below were correct, paragraph (d) still conflicts with the Robinson-Patman Act in two important ways: (1) it requires uniform, state-wide price differentials while Section 2(b) permits only non-uniform, geographically limited differentials; and (2) it prohibits price differentials without regard to injury to competition while Section 2(a) of the Robinson-

Patman Act prohibits price differentials only if there is injury to competition.

ARGUMENT

I. THE MARYLAND ACT IS INVALID UNDER THE COMMERCE CLAUSE.

The Constitution provides in Article I, section 8, clause 3, that "Congress shall have Power . . . To regulate Commerce with foreign Nations, and among the several States . . ."

Paragraphs (b), (c), and (d) of the Maryland statute are invalid under the commerce clause because they:

(1) discriminate against interstate commerce,

(2) unreasonably burden interstate commerce, and

(3) undertake to regulate interstate commerce in an area in which there is a need for national uniformity of regulation.

A. The Maryland Act Discriminates Against Interstate Commerce.

Producers and refiners distribute petroleum products to the consuming public through both company-operated and independently-run retail service stations. Paragraphs (b) and (c) of the Maryland Act eliminate one of these distribution methods, the company-operated retail service station. If allowed to stand, the Act will alter radically the structure of the petroleum industry, which has, until now, depended on both avenues of distribution. Moreover, the problem is magnified by the enactment of similar statutes in several

states,[10] and the extensive consideration being given related measures in 31 state legislatures.[11]

The Act has the effect of excluding from the Maryland retail service station market all interstate petroleum producers and refiners, thus in essence preserving that market for Maryland's own citizens, the independent retail service station dealers. Such a clear discrimination against interstate commerce is constitutionally impermissible. *Hunt* v. *Washington State Apple Advertising Comm.*, decided June 20, 1977; *Dean Milk Co.* v. *Madison*, 340 U.S. 349 (1951).

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[10] Delaware and the District of Columbia have adopted statutes which prohibit petroleum producers or refiners from operating retail stations and require prices and allowances to be uniform. Del. Code tit. 6, §§ 2905-2906 (Cum. Supp. 1976); D. C. Law 1-123 (April 7, 1977). The Delaware statute was recently upheld. *Atlantic Richfield Co.* v. *Tribbitt*, Case Nos. 4692, 4774 (Ct. of Chancery, New Castle County, Delaware, August 25, 1977). Florida enacted a law limiting the percentage of retail stations which could be company operated. Fla. Stat. Ann. § 526.151 (Supp. 1976) (held unconstitutional under the Florida Constitution in *Exxon Corp.* v. *Conner*, Case No. 74-1449 (Cir. Ct., 2d Jud. Cir., Leon County, Florida, January 23, 1975)). California and Rhode Island have adopted statutes which require price allowances to be uniform. Cal. Bus. & Prof. Code § 21200 (Deering) (held unconstitutional under the federal Constitution in *Shell Oil Co.* v. *Younger*, 1976-1 Trade Cases (CCH) ¶ 60,960 (N.D. Cal. 1976), *appeal docketed*, No. 76-2784 (9th Cir. Aug. 13, 1976)); Rhode Island, R.I. Gen. Laws § 5-55-5 (Supp. 1976).

[11] Legislatures in the following states have been or are considering related measures: Alabama, Alaska, Arizona, Arkansas, Colorado, Connecticut, Georgia, Hawaii, Illinois, Indiana, Iowa, Kansas, Louisiana, Maine, Massachusetts, Minnesota, Missouri, Nevada, New Hampshire, New Jersey, New York, North Carolina, Oregon, Pennsylvania, Tennessee, Vermont, Washington, West Virginia, and Wisconsin. California and Rhode Island, which have adopted statutes which require uniform price allowances, *see* note 10, *supra*, also have been considering legislation which requires divestiture of company-operated retail service stations.

The Maryland Court of Appeals dismissed the contention that the Act discriminates against interstate commerce on the ground that the Act is equally applicable to all producers and refiners, and would equally exclude Maryland refiners from the market—if there were any. (App. A, p. 19a.) This approach ignores the principle that a discrimination may exist even though the statute is neutral on its face. *Dean Milk Co.* v. *Madison*, 340 U.S. 349 (1951); *Nippert* v. *City of Richmond*, 327 U.S. 416, 431 (1946). This Court recognized long ago that the commerce clause forbids discrimination "whether forthright or ingenious." *Best & Co.* v. *Maxwell*, 311 U.S. 454, 455 (1940). Any other view would mean that the commerce clause had no effect "save for the rare instance where a state artlessly discloses an avowed purpose to discriminate against interstate goods." *Dean Milk Co.* v. *Madison*, 340 U.S. 349, 354 (1951).

Thus the court below stopped short of the relevant inquiry: whether the Act discriminates against interstate commerce *in practical effect*. *Id.* This Court has held that in "erecting an economic barrier protecting a major local industry against competition from without the State," a law "plainly discriminates against interstate commerce." *Id.* Since there are no Maryland producers or refiners, that is precisely what this law does. Moreover, this Court has recently noted that where—as here [12]—passage of the discriminatory law was actively sought by the local industry which the law effectively protects, closer scrutiny of the possibility that "its discriminatory impact on interstate commerce was not an unintended byproduct" is appro-

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[12] *See* App. A, p. 9a.

priate. *Hunt* v. *Washington State Apple Advertising Comm.*, decided June 20, 1977.

B. The Maryland Act Burdens Interstate Commerce.

The Maryland Act imposes a heavy burden on interstate commerce. It forces interstate producers and refiners to discontinue retail operations in Maryland. This in turn may impede both the flow of gasoline and the flow of capital between other states and Maryland. The statute will also preclude oil companies not now engaged in Maryland activities from entering the Maryland market unless they are willing to forego the economically attractive option of operating retail outlets.[13] Those partially integrated private brand marketers which presently play an active competitive role in the Maryland market and cannot afford to retail gasoline except through company-operated outlets, will be driven out of the state. Other private brand marketers which are planning to integrate backwards into refining in order to strengthen their competitive posture, will be barred from doing so.

This disruption of interstate commerce failed to move the Maryland Court of Appeals, which took the erroneous position that the commerce clause applies only where a law interrupts the actual flow of goods between states. This is a much too narrow application

[13] This Court has recognized the important role played by such potential competitors. For example, it has prohibited mergers where one of the parties might have entered the other party's market on its own, because the mere presence of the potential competitor waiting in the wings has a positive effect on competition. *United States* v. *Falstaff Brewing Corp.*, 410 U.S. 526, 532-33 (1973); *FTC* v. *Procter & Gamble Co.*, 386 U.S. 568, 581 (1967); *United States* v. *Penn-Olin Chemical Co.*, 378 U.S. 158, 174 (1964).

of the clause, as this Court has consistently recognized. In *Hunt* v. *Washington State Apple Advertising Comm.*, decided June 20, 1977, increasing the costs of doing business for the out-of-state marketer and stripping away the competitive and economic advantages which the out-of-state marketer had earned for itself, were held to be impermissible burdens. *See also Nippert* v. *City of Richmond*, 327 U.S. 416 (1946) (tax which gave competitive advantage to local merchants over out-of-state competitors held impermissible burden). The fact that oil companies could still sell their products in Maryland (to independent dealers or jobbers) is therefore irrelevant.

The court below also asserted that gasoline retailing is "a wholly intrastate activity." (App. A, p. 18a.) Here again the court's conclusion is too facile; it ignores the standards established by this Court. In determining whether an activity involves interstate commerce, this Court considers such factors as whether it exerts a substantial economic effect on interstate commerce, whether the products sold move across state lines, and whether the purchasers are involved in interstate activities. *Perez* v. *United States*, 402 U.S. 146 (1971); *Katzenbach* v. *McClung*, 379 U.S. 294 (1964); *Nippert* v. *City of Richmond*, 327 U.S. 416, 424 (1946); *Wickard* v. *Filburn*, 317 U.S. 111 (1942). Measured by these criteria, gasoline retailing is unquestionably an interstate activity.[14] The conclusion of the court below is also contrary to this Court's holding that the sale of gasoline is an interstate activity subject to the federal antitrust laws. *FTC* v. *Sun Oil Co.*, 371 U.S.

[14] Surely, for example, the retailers are subject to the provisions of the National Labor Relations Act, 29 U.S.C. § 151 *et seq.* (1970), and the Fair Labor Standards Act, 29 U.S.C. § 201 *et seq.* (1970).

505 (1963); *Standard Oil Co.* v. *FTC*, 340 U.S. 231 (1951).

C. The Maryland Act's Discrimination Against and Burden on Interstate Commerce Cannot Be Justified on the Basis of Local Benefits.

Once a state statute has been found to discriminate against or burden interstate commerce, the burden must be considered in the light of the local interests the statute was designed to serve and the means available to promote them. *Pike* v. *Bruce Church, Inc.*, 397 U.S. 137 (1970). If the local interests at stake are illegitimate, insubstantial compared to the burden, or not in fact served by the statute, or if less restrictive alternatives exist, the statute will not be sustained. *See Great Atlantic & Pacific Tea Co.* v. *Cottrell*, 424 U.S. 366 (1976).

1. *The Local Interest Is Illegitimate.*

The avowed purpose of the Act was to preserve competition in gasoline retailing. (App. A, p. 19a.) However, the history of the legislation and its support by local independent dealers (App. A, p. 9a) led the trial court to conclude that the real purpose of the Act was to protect local dealers from out-of-state competition (App. D, p. 131a); and that is unquestionably its effect. *Cf. Foster-Fountain Packing Co.* v. *Haydel*, 278 U.S. 1, 10 (1928) (a court is not bound by legislative declarations of purpose). The protection of local economic interests is *not* a legitimate local concern. Economic protectionism is precisely what the commerce clause was designed to proscribe. *H. P. Hood & Sons, Inc.* v. *DuMond*, 336 U.S. 525 (1949).

2. *The Local Interests Are Outweighed By the Burden on Interstate Commerce.*

Even if this Court accepts the state's assertion of appropriate local interests, these interests are insubstantial compared to the burden on interstate commerce, and are not in fact promoted by the terms of the Act. The local interests on which the state relies are the need for fair allocation of gasoline between a company's self-operated stations and its dealer-operated ones in time of shortage, and the need to halt the trend toward more company-operated stations. (App. A, pp. 14a-15a, 19a.) Neither provides any justification for paragraph (c) of the Act, which calls for divestiture of existing company-operated stations. The need for fair allocation is fully served by paragraph (f), and any valid need to prevent an increase in company-operated stations is fully served by paragraph (b). Moreover, paragraph (f) was not needed to assure fair allocation because the federal Emergency Petroleum Allocation Act already provides a scheme for mandatory fair allocation in time of shortage.[15] 15 U.S.C. § 751 *et seq.* (Supp. V 1975); 10 C.F.R. §§ 210-211 (1977). Finally, neither purpose justifies including under the Act the private brand marketers which have *only* company-operated outlets: since they have no dealer-operated stations, it is *impossible* for these marketers to disfavor their dealer-operated stations in allocation or to convert them to company operation.

To the extent that the purpose of the Act may be said to be the general promotion of competition, here too the statute fails to meet constitutional require-

[15] *Amici* contend below that paragraph (f) is preempted by the EPAA. *See* pages 20-31, *infra*.

ments. By excluding from the Maryland market the partially integrated private brands, the Act substantially reduces competition—not only because it leaves fewer sellers in the market but also because the private brands are a principal source of price competition. The court below conceded this and further noted that "[a]s of now there has been no evidence by which to judge the effects of these statutes and predictions as to the effects of the Act are at best speculative." (App. A, pp. 15a-16a.) The state has thus failed to sustain its burden to justify the Act by demonstrating that it will promote its purported goals. *See Hunt* v. *Washington State Apple Advertising Comm.*, decided June 20, 1977.

3. *There Are Less Restrictive Alternatives.*

Again assuming *arguendo* that the Act was designed to promote the state's interests in fair allocation and preserving dealer-operated stations, those interests could be promoted as well with a lesser impact on interstate commerce. As noted above, the Emergency Petroleum Allocation Act fully serves the state's interest in fair allocation. Maryland's interest in protecting independent dealers from improperly being squeezed out in favor of company-operated stations is adequately served by the federal and Maryland antitrust laws, Md. Com. Law Code Ann. §§ 11-201 *et seq.* and 11-401 *et seq.* (1975); the Robinson-Patman Act, 15 U.S.C. §§ 13-13b, 21a (1970); the Maryland Gasoline Products Marketing Act, Md. Com. Law Code Ann. § 11-301 *et seq.* (1975); and Section 5 of the Federal Trade Commission Act, 15 U.S.C. § 45 (1970). The latter has recently been applied to alleged unfair provisions in retail service station transactions. *Phillips Petroleum Co.*, 84 F.T.C. 1666 (1974) (consent order for settlement purposes only with no admission or finding of violation); *Standard Oil Co. (Ohio)*, Dkt. 8910, CCH Trade Reg. Rep. ¶ 20,134 (proposed complaint, 1972), ¶ 20,208 (complaint issued, 1973), ¶ 21,329 (consent order to cease and desist, 1977).

D. The Maryland Act Regulates Interstate Commerce in an Area in Which There is a Need for National Uniformity of Regulation.

Any state statute which affects interstate commerce must pass a third test. In addition to being non-discriminatory and reasonably adapted to the local end sought, it must concern itself only with the local aspects of interstate activities and not intrude into areas where there is a need for national uniformity of regulation.

First, a statute must confine itself to the local aspects of interstate activities. No state has the power to regulate commerce beyond its borders. *Baldwin* v. *G.A.F. Seelig, Inc.*, 294 U.S. 511, 521 (1935); *Southern Pacific Co.* v. *Arizona*, 325 U.S. 761, 773, 775 (1945). Paragraph (d) of the Act exceeds these limits by effectively tampering with gasoline pricing outside Maryland. Under paragraph (d), a company cannot extend a price allowance to one station in Maryland without extending it to all stations in Maryland. In the absence of a statutory defense, *see, e.g.*, 15 U.S.C. § 13(b), the Robinson-Patman Act, 15 U.S.C. § 13(a) (1970), forbids a company to extend a price allowance to one station without extending it to competitors in the same market area.[18]

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[18] A market area may spill across state boundaries. *See, e.g., Ingram* v. *Phillips Petroleum Co.*, 259 F.Supp. 176, 182 (D.N.M. 1966).

Amici contend below that paragraph (d) is preempted by the Robinson-Patman Act. *See* pages 32-41, *infra*.

If a company were to decide to extend a price allowance to one station in the eastern part of the District of Columbia, the Robinson-Patman Act might well require the company to extend the allowance to competing stations in Prince George's County, Maryland. However, if the allowance were extended to even one Prince George's County service station, paragraph (d) would require that it be extended to every station in the entire state of Maryland. At that point, the Robinson-Patman Act might well require that the price allowance be extended to dealers in Wilmington, Delaware, or other border towns deemed to be in the same market area as any Maryland station. Thus, the Maryland Act impinges on and greatly inhibits a company's pricing practices in the District of Columbia and all the states that border Maryland."

Second, "a state may not impose a burden which materially affects interstate commerce in an area where uniformity of regulation is necessary." *Huron Portland Cement Co.* v. *Detroit*, 362 U.S. 440, 444 (1960). "[E]ver since *Gibbons* v. *Ogden* . . . the states have not been deemed to have authority . . . to regulate those phases of the national commerce which, because of the need of national uniformity, demand that their regulation, if any, be prescribed by a single authority." *Southern Pacific Co.* v. *Arizona*, 325 U.S. 761, 767 (1945). Maryland has attempted to restructure the petroleum

[17] Paragraph (d) also burdens interstate commerce in that it requires the granting of price allowances to all stations within Maryland but not to those outside the state. In reporting on the Robinson-Patman Act, the Congress found: "When granted to those within the State and denied to those beyond, [price discriminations] involve . . . a directly resulting burden upon interstate commerce with the latter." S. Rep. No. 1502, 74th Cong., 2d Sess. 4 (1936). *See also* H.R. Rep. No. 2287, 74th Cong., 2d Sess. 8 (1936).

industry. This Court has always been less receptive to such economic legislation by the states than to state legislation which bears on the health or safety of its citizens. *See, e.g., H. P. Hood & Sons, Inc.* v. *DuMond*, 336 U.S. 525 (1949). The economic management of the petroleum industry is clearly a matter of national concern which should be addressed by Congress.[18] In fact, it has been. In the federal Emergency Petroleum Allocation Act, Congress responded to the same concern—national in scope—which Maryland has attempted to take into its own hands.[19]

This action is doubly relevant, for the state's power to legislate in areas affecting interstate commerce is a strictly limited one. As this Court said in *South Carolina Hwy. Dept.* v. *Barnwell Bros.*, 303 U.S. 177, 185 (1938) (emphasis added):

> "[I]t has been recognized that there are matters of local concern, the regulation of which unavoidably involves some regulation of interstate commerce but which, because of their local character and their number and diversity, may never be fully dealt with by Congress. Notwithstanding the commerce clause, such regulation *in the absence of Congressional action* has for the most part been left to the states by the decisions of this Court, subject to the other applicable constitutional restraints."

[18] The threat to national uniformity is magnified by the passage of similar laws by several states in addition to Maryland. *See* notes 10 and 11, at page 10, *supra*.

[19] The Congress is also considering legislation which would restructure the petroleum industry. *See, e.g.*, S. 795, 95th Cong., 1st Sess., 123 Cong. Rec. S2974 (daily ed. Feb. 24, 1977); H.R. 3370, 95th Cong., 1st Sess., 123 Cong. Rec. H1074 (daily ed. Feb. 9, 1977); 9 Nat'l J. 170-173 (1977).

See also Morris v. *Duby*, 274 U.S. 135, 143 (1927). Thus the passage of the Emergency Petroleum Allocation Act occupies the field and precludes the operation of the Maryland law.[20]

II. PARAGRAPH (f) OF THE MARYLAND STATUTE IS PREEMPTED BY THE FEDERAL EMERGENCY PETROLEUM ALLOCATION ACT OF 1973, BY VIRTUE OF THE SUPREMACY CLAUSE OF THE UNITED STATES CONSTITUTION.

A. Under This Court's Decisions, Paragraph (f) is Barred by the Supremacy Clause.[21]

In 1973 Congress established a nationwide program for the allocation of scarce petroleum supplies. The Emergency Petroleum Allocation Act (EPAA), 15 U.S.C. § 751 *et seq.*, requires the President to develop, in accordance with detailed guidelines established by Congress, a comprehensive program of mandatory allocation of petroleum products during times of shortage. The President delegated his authority to the Administrator of the Federal Energy Administration, who adopted comprehensive and detailed regulations. *See* 10 C.F.R. §§ 211.1-211.225 (1977).

Thereafter, Maryland passed the present statute which also deals with the allocation of gasoline and petroleum-based fuel. It provides in paragraph (f):

> "Every producer, refiner or wholesaler of petroleum products shall apportion uniformly all gasoline and special fuels to all retail service station dealers during periods of shortages on an equitable basis, and shall not discriminate among the dealers in their allotments."

[20] *See also Leisy* v. *Hardin*, 135 U.S. 100, 108-109 (1890).

[21] U.S. Const. Art. VI, cl. 2: "This Constitution, and the Laws of the United States which shall be made in Pursuance thereof . . . shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding."

1. *Congress Has Occupied the Field.*

This Court has often held that state regulation is preempted if the scheme of federal regulation of the same subject is pervasive and comprehensive. *Rice* v. *Santa Fe Elevator Corp.*, 331 U.S. 218 (1947); *City of Burbank* v. *Lockheed Air Terminal, Inc.*, 411 U.S. 624 (1973); *Campbell* v. *Hussey*, 368 U.S. 297 (1961). Where Congress has occupied the field, the states are barred from imposing any additional regulation, even if it appears to supplement rather than conflict with the federal program: in this situation "complementary state regulation is as fatal as state regulations which conflict with the federal scheme." *Campbell* v. *Hussey*, 368 U.S. 297, 302 (1961); *accord, De Canas* v. *Bica*, 424 U.S. 351, 356 (1976); *Hines* v. *Davidowitz*, 312 U.S. 52 (1941).

The EPAA and the regulations promulgated under it clearly occupy the entire area relating to the allocation of petroleum products. The regulations set forth distinct allocation formulae for each type of petroleum-based fuel and each type of consumer, with a special section dealing solely with the allocation of gasoline to retail service station dealers. 10 C.F.R. § 211.106 (1977). The federal program is the result of a sensitive balancing of competing political, economic, social and regional interests. It sets forth nine objectives which are to be accommodated "to the maximum extent practicable." 15 U.S.C. § 753(b)(1) (Supp. V 1975). Both the Congress and the courts have recognized the exceedingly complex and finely-tuned nature of this undertaking. *See, e.g.*, H.R. Rep. No. 628, 93rd Cong., 1st Sess. 12 (1973); *Air Transport Ass'n of America* v. *FEO*, 520 F.2d 1339, 1342 (Emer. Ct. App. 1975); *Condor Operating Co.* v. *Sawhill*, 514 F.2d 351, 359 (Emer. Ct. App.), *cert. denied*, 421 U.S. 976 (1975).

These characteristics of the EPAA are precisely the kind which this Court has found to be evidence of a congressional intent to preempt state legislation. For example, in *City of Burbank* v. *Lockheed Air Terminal, Inc.*, 411 U.S. 624, 632, 634 (1973), the Court noted that Congress had set forth "particularized standards" for regulation of aircraft noise, and that the system of federal regulation was intricate. The Court stated:

> "The Federal Aviation Act requires a delicate balance between safety and efficiency . . . and the protection of persons on the ground . . . . The interdependence of these factors requires a uniform and exclusive system of federal regulation if the congressional objectives underlying the Federal Aviation Act are to be fulfilled."

Id. at 638-39.

In evaluating the preemptive intent of Congress, this Court has also given great weight to the creation of an agency to administer the federal scheme. In discussing preemption by the National Labor Relations Act, the Court has stated:

> "[T]he unifying consideration of our decisions has been regard to the fact that Congress has entrusted administration of the labor policy for the Nation to a centralized administrative agency, armed with its own procedures, and equipped with its specialized knowledge and cumulative experience . . ."

San Diego Bldg. Trades Council v. *Garmon*, 359 U.S. 236, 242 (1959); *accord, Garner* v. *Teamsters Union*, 346 U.S. 485, 490-91 (1953). Less than a week after the passage of the EPAA, the President created the Federal Energy Office and transferred to it all his

authority under the EPAA. Exec. Order No. 11748, 3 C.F.R. 822 (1973). That office was soon replaced by the Federal Energy Administration (FEA), one of whose express purposes was to insure fair distribution of petroleum fuels, 15 U.S.C. § 761 (Supp. V 1975), and the President promptly delegated all of his powers under the EPAA to it. Exec. Order No. 11790, 3 C.F.R. 882 (1974).

The FEA was, in turn, recently replaced by the federal Department of Energy, which absorbed all of the functions of the FEA. Department of Energy Organization Act, Pub. L. No. 95-91, § 301(a), 91 Stat. 565 (1977). In creating a Cabinet-level energy agency, Congress recognized the urgent need for "the comprehensive, centralized focus necessary for effective coordination of energy supply and conservation programs . . ." Pub. L. No. 95-91, *supra*, § 101(4).

2. *Paragraph (f) Stands As An Obstacle to the Accomplishment of the Full Purposes of Congress.*

A state law is equally preempted if it "stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress." *Hines* v. *Davidowitz*, 312 U.S. 52, 67 (1941); *accord, Jones* v. *Rath Packing Co.*, 430 U.S. 519 (1977). This is a broader inquiry than the question, discussed below,[22] whether anything in the state law conflicts with the terms of the federal law. Here the Court is "concerned with delimiting areas of *potential* conflict; potential conflict of rules of law, of remedy, and of administration." *San Diego Bldg. Trades Council* v. *Garmon*, 359 U.S. 236, 242 (1959) (emphasis added). In a holding which clearly

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[22] *See* page 31, *infra*.

applies to Maryland's intrusion into petroleum allocation, the Court said:

> "To leave the States free to regulate conduct so plainly within the central aim of federal regulation involves too great a danger of conflict between power asserted by Congress and requirements imposed by state law."

Id. at 244; *accord, Rice* v. *Santa Fe Elevator Corp.*, 331 U.S. 218, 231-32 (1947).

This Court has also found preemption where there was a potential conflict between the federal and state procedural schemes. "A multiplicity of tribunals and a diversity of procedures are quite as apt to produce incompatible or conflicting adjudications as are different rules of substantive law." *Garner* v. *Teamsters Union*, 346 U.S. 485, 490-91 (1953); *accord, San Diego Bldg. Trades Council* v. *Garmon*, 359 U.S. 236, 242 (1959).

Even the Maryland Court of Appeals recognized the potentiality of conflict between the execution of paragraph (f) and the regulations promulgated under the EPAA.[23] (App. A, p. 32a.) In upholding paragraph (f), that court considered it sufficient that the state law *could conceivably* be administered in a way that would *not* conflict with the EPAA. But in *Rice* v. *Santa Fe Elevator Corp.*, 331 U.S. 218, 231-32 (1947), this Court rejected precisely that argument. There the state urged the Court to allow the state regulation to proceed and

[23] That potentiality is enhanced by the extremely vague mandate of paragraph (f), which sets virtually no limits on the discretion of Maryland's Comptroller of the Treasury, in whom power to administer the Act is vested. Md. Ann. Code art. 56, § 157B(a) (1972 Repl. Vol., 1976 Cum. Supp.).

to wait and see if any of it actually conflicted with the federal scheme. The Court said that "at first blush" the argument "has great plausibility," but it rejected it because "such a construction would thwart the federal policy which Congress adopted" in the federal law. *Id.* at 232. There, as here, the very existence of a "dual system of regulation" was incompatible with the federal scheme, even if no actual conflict arose. *Id.* at 234.

The need for a single federal system of petroleum allocation is patent. Petroleum shortages are a nationwide problem that can be ameliorated only on a national basis. The sensitive accommodation of policy considerations mandated by the EPAA and discussed above cannot be accomplished if each state is allowed to impose additional and potentially inconsistent regulation. It should not be overlooked that to approve Maryland's intrusion into the field would be to approve not just one small digression, but the creation of fifty separate and uncoordinated allocation programs.[24] Congress clearly expressed its intention to preclude that result by providing for a comprehensive and exceedingly intricate federal program. *See* discussion *supra,* pages 20-23. It also stated as one of its findings that:

> "such hardships and dislocations jeopardize *the normal flow of commerce* and constitute a national energy crisis which is a threat to the public health, safety, and welfare and can be averted or minimized most efficiently and effectively through prompt action *by the Executive branch of Government.*"

15 U.S.C. § 751(a)(3) (emphasis added). Similarly, the House Committee reporting the bill cited "the need

[24] This threat is already becoming reality. *See* notes 10 and 11, at page 10, *supra.*

for *Federal intervention* in the market to order mandatory allocation of certain fuels . . ." H.R. Rep. No. 531, 93d Cong., 1st Sess. 6 (1973) (emphasis added).

In addition, Congress included in the EPAA an express statement of its intention to preempt the field. (Ironically, it is that very statement on which the Maryland Court of Appeals relied in upholding the state law. *See* pages 26-28, *infra.*) Section 755(b) of the EPAA states:

> "The regulation under Section 753 of this title and any order issued thereunder shall preempt any provision of any program for the allocation of crude oil, residual fuel oil, or any refined petroleum product established by any state or local government if such provision is in conflict with such regulation or any such order."

That language confirms that state regulation of petroleum allocation would frustrate the purposes and objectives of Congress.[25]

B. The Language of § 755(b) Does Not Make Preemption Inapplicable.

1. *The Court of Appeals Incorrectly Construed § 755(b).*

The Maryland Court of Appeals noted that the terms of § 755(b) preempted any provision of any state

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[25] It is of no avail that the underlying purposes of the state law and the EPAA are similar. As this Court stated in *Florida Lime & Avocado Growers, Inc.* v. *Paul,* 373 U.S. 132, 142 (1963):

> "The test of whether both federal and state regulations may operate, or the state regulation must give way, is whether both regulations can be enforced without impairing the federal superintendence of the field, not whether they are aimed at similar or different objectives."

program "if such provision is in conflict with" the EPAA, and concluded that the section was intended to narrow the normal scope of preemption so as to bar only state programs which actually conflict with federal law. (App. A, p. 30a.) It then interpreted "actual conflict" to cover only patently contradictory provisions and, finding none, upheld the Act.

The court's construction of § 755(b) is erroneous for several reasons. First, it makes the section a mere restatement of the supremacy clause and, thus, quite without effect. Of course, an important provision in a carefully drafted statute should not be construed in a way that renders it superfluous. 2A Sutherland, Statutes and Statutory Construction § 46.06 (4th ed. C. Sands 1973).

Second, the court's construction transforms an affirmatively phrased preemption provision into an expression of intent not to preempt. This can hardly have been the intention of Congress. When Congress has intended non-preemption in other statutes, it has said so in straightforward terms. *See, e.g.,* 7 U.S.C. § 2051 (Supp. V 1975), *construed in De Canas* v. *Bica,* 424 U.S. 351, 362 (1976) ("provisions contained herein are intended to supplement State action and compliance with this chapter shall not excuse anyone from compliance with appropriate State law and regulation"); 15 U.S.C. § 78bb(a) (Supp. V 1975), *construed in Merrill Lynch, Pierce, Fenner & Smith, Inc.* v. *Ware,* 414 U.S. 117, 138 n. 16 (1973) (federal rights and remedies "shall be in addition to any and all other rights and remedies that may exist at law or in equity"; "[n]othing in this chapter shall affect the jurisdiction of the securities commission . . . of any

State . . . insofar as it does not conflict with the provisions of" the federal act).

Third, in other parts of the EPAA, Congress spelled out a limited role for the states to play in the allocation process. 15 U.S.C. § 754(b) (Supp. V 1975); 10 C.F.R. §§ 211.15, 211.17 (1977). The Court of Appeals' construction of § 755(b) is irreconcilable with these provisions, since they narrowly circumscribe the state role and emphasize federal supervision and coordination of it. *See Rice* v. *Santa Fe Elevator Corp.*, 331 U.S. 218, 234 n. 12 (1947) (one factor in finding preemptive intent was presence in federal statute of provisions specifically subjecting *certain* aspects of subject to state law).

Fourth, the intention to preempt state regulation—already evidenced in the legislative history, quoted *supra* at pages 25-26, and the terms of the EPAA—is further expressed in the Federal Energy Administration Act, 15 U.S.C. § 761 (Supp. V 1975). Among the purposes of the agency created, in part, to administer the EPAA, are listed: "to insure fair and efficient distribution" of fuel and "to assure a coordinated and effective approach to overcoming energy shortages. . ."[26] Again, it would be anomalous to find, as the court below did, a congressional intention in the EPAA to allow fifty *un*coordinated and *un*supervised state programs.

Fifth, as noted *supra* at pages 24-25, the theory advanced by the Court of Appeals that § 755(b) prohibits only actual conflicts if and when they arise, was expressly rejected in *Rice* v. *Santa Fe Elevator Corp.*, 331 U.S. 218, 231-32 (1947).

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[26] *See also* statement of purposes of newly created Department of Energy, discussed at page 23, *supra*.

2. *Even If the Maryland Court's Construction of § 755(b) Were Correct, Paragraph (f) Is Nevertheless Preempted.*

Most importantly, even if the court below was correct that § 755(b) provides for preemption only in cases of actual conflict, it was wrong in ending the inquiry there. The court assumed, without citing any support for its assumption, that if § 755(b) expressed a limited preemptive intent, that was dispositive, and ordinary preemption principles did not apply. As a result, the court did not even reach the question "whether the existence of a comprehensive system of federal regulation necessarily precludes state regulation . . ." (App. A, p. 30a.)

The assumption made by the Court of Appeals reflects a fundamental misunderstanding of the supremacy clause. As one authority has written: "Pre-emption can never be the product of statutory construction alone, since the Court and only the Court can make the final judgment of incompatibility required by the supremacy clause." Note, *Pre-emption as a Preferential Ground: A New Canon of Construction,* 12 Stan. L. Rev. 208 (1959), *quoted in* G. Gunther, Cases and Materials on Constitutional Law 359 (9th ed. 1975). This Court recently recognized that principle in a case which closely parallels the instant one. In *Jones* v. *Rath Packing Co.*, 430 U.S. 519 (1977), the Court discussed a preemption provision which barred all state laws "which are less stringent than or require information different from the requirements of" the federal law. The Court found that the state law in question did not require different information and was, therefore, not preempted by the terms of the federal

provision. Nevertheless, it went on to say (430 U.S. at 540-41):

> "That holding does not, however, resolve this case, for *we still must determine* whether the state law 'stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress.'" [Emphasis added.]

The Court then concluded that the state law did interfere with the federal purposes and accordingly held the state law invalid.

Similarly, in *De Canas* v. *Bica,* 424 U.S. 351, 357 n. 5 (1976), the Court noted: "Of course, even absent such a manifestation of congressional intent to 'occupy the field', the Supremacy Clause requires the invalidation of any state legislation that burdens or conflicts in any manner with any federal laws or treaties." The Court found that the terms of the federal law in question did not totally preempt the field. Nevertheless, it continued:

> "There remains the question whether, although the INA [Immigration and Naturalization Act] contemplates some room for state legislation, [the state law] is *nevertheless unconstitutional* because it 'stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress' in enacting the INA."

Id. at 363 (emphasis added).

Thus, it is clear that, even as construed by the Maryland Court of Appeals, the language of the EPAA preemption provision did not obviate analysis (1) of the comprehensiveness of the federal scheme and (2) of potential interference by the state law with the purposes of the EPAA. The state court erred in omitting these inquiries. As shown above, these basic principles of preemption require the conclusion that paragraph (f) is preempted by the EPAA, and § 755(b)—even as incorrectly construed by the court below—does not support a contrary result.

3. *There Are Actual Conflicts Between Paragraph (f) and the EPAA.*

Finally, even assuming that the court below was correct that the EPAA preempts only those state allocation programs which actually conflict with the federal scheme, it erred in upholding the state statute. There are clear actual conflicts between the two programs. For example, paragraph (f) calls for "uniform" apportionment of fuels, while the EPAA regulations set forth complicated formulae dependent on base period volume and allocation fractions, which are anything but uniform. 10 C.F.R. §§ 211.10, 211.106 (1977). Those formulae are, in turn, founded on the accommodation of nine overlapping policy considerations. 15 U.S.C. § 753(b)(1). Paragraph (f) allows for no distinction between gasoline and "special fuels". In contrast, the EPAA sets forth allocation regulations for motor gasoline, 10 C.F.R. § 211.107(b), but exempts diesel fuel, 41 Fed. Reg. 24518 (1976).

The above conflicts appear on the face of the Maryland Act. It is likely that even more actual conflicts would arise as soon as the Comptroller of Maryland began to implement the almost unlimited discretion committed to him by paragraph (f). The fact that the nature of these conflicts is unknown and unknowable at the present time underscores rather than diminishes the applicability of the supremacy clause.

III. THE MARYLAND COURT OF APPEALS ERRED IN ITS DETERMINATION OF THE SCOPE OF SECTION 2(b) OF THE ROBINSON-PATMAN ACT AND OF THE COMPATIBILITY OF THAT ACT WITH PARAGRAPH (d) OF THE MARYLAND STATUTE.

A. Section 2(b) of the Robinson-Patman Act was Incorrectly Interpreted by the Court Below.

Section 2(b) of the Robinson-Patman Act, 15 U.S.C. § 13(b), provides that a seller can rebut a *prima facie* case of unlawful price discrimination among purchasers in violation of Section 2(a) of the Act [27] by showing that "his lower price . . . to any purchaser or purchasers was made in good faith to meet an equally low price of a competitor . . ." This Court has held that this Section 2(b) "meeting competition" defense is an absolute defense against liability under Section 2(a), irrespective of any adverse effects on competition engendered by such price discrimination. *Standard Oil Co.* v. *FTC*, 340 U.S. 231, 241, 246-247 (1951).

Paragraph (d) of the Maryland statute provides:

> "Every producer, refiner or wholesaler of petroleum products supplying gasoline and special fuels to retail service station dealers shall extend all voluntary allowances uniformly to all retail service station dealers supplied."

[27] Section 2(a) provides, in pertinent part:

> "It shall be unlawful for any person engaged in commerce, in the course of such commerce, either directly or indirectly, to discriminate in price between different purchasers of commodities of like grade and quality, where either or any of the purchases involved in such discrimination are in commerce, where such commodities are sold for use, consumption, or resale within the United States or any Territory thereof or the District of Columbia or any insular possession or other place under the jurisdiction of the United States, and where the effect of such discrimination may be substantially to lessen competition or tend to create a monopoly in any line of commerce, or to injure, destroy, or prevent competition with any person who either grants or knowingly receives the benefit of such discrimination, or with customers of either of them. . . ." 15 U.S.C. § 13(a).

"Voluntary allowances" was construed by the court below to mean "temporary price reductions in the wholesale price to a retail dealer to enable the dealer to meet the lower price of a competing dealer." (App. A, p. 35a.) Paragraph (d) makes voluntary allowances or price discriminations a state-wide matter.

In reaching its conclusion that there was no conflict between Paragraph (d) and Section 2(b) of the Robinson-Patman Act (App. A, p. 40a), the Maryland Court of Appeals relied on one of two conflicting views in lower federal courts relating to the circumstances in which the Section 2(b) "meeting competition" defense is available. The case relied on is *Enterprise Industries* v. *Texas Co.*, 136 F. Supp. 420, 421 (D. Conn. 1955), *reversed on other grounds*, 240 F.2d 457 (2d Cir.), *cert. denied*, 353 U.S. 965 (1957). (App. A, pp. 37a, 39a-40a.) [28] But that case is explicitly contradicted by a decision of the United States Court of Appeals for the Seventh Circuit, *Bargain Car Wash, Inc.* v. *Standard Oil Co. (Indiana)*, 466 F.2d 1163, 1175 (7th Cir. 1972),[29] and implicitly contradicted by

[28] The federal district court held that, under Section 2(b), a seller could offer a buyer ("buyer 1") a lower price only if that specific buyer ("buyer 1") had been offered an equally low price by a competitor of the seller. *Enterprise Industries* v. *Texas Co.*, *supra*, 136 F. Supp. at 421.

[29] The Seventh Circuit held, in an opinion written by the late Mr. Justice Clark, sitting by designation, and concurred in by now Mr. Justice Stevens, that under Section 2(b), a seller could offer

the decisions of two other appellate courts and one district court.[30] It is also contradicted by the Federal Trade Commission's and the Department of Justice's interpretations of Section 2(b).[31]

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a buyer ("buyer 1") a lower price to meet the equally low price offered by a competitor of the seller to *its* buyer ("buyer 2"). The Seventh Circuit did not, unlike *Enterprise*, require that there be identity of the buyer to which a lower price had been extended, nor that the buyer to which the lower price had been extended be a buyer of the seller desiring to make a price differential. In reaching this conclusion, the Seventh Circuit was quite explicit. It gave this example of the circumstance in which the Section 2(b) defense was available:

> "The Section 2(b) defense is available if the lower price granted by American to its dealer 'X' is made to meet an equally low price offered by a competitor of American to a competitor of 'X'." *Bargain Car Wash, Inc.* v. *Standard Oil Co. (Indiana), supra,* 466 F.2d at 1175 n.8.

[30] *See Covey Oil Co.* v. *Continental Oil Co.*, 340 F.2d 993, 997-998 (10th Cir.), *cert. denied,* 380 U.S. 964 (1965) (Section 2(b) defense available when petroleum supplier lowers price and second supplier also lowers price to prevent losing retail customer because competition in prices existed and suppliers were at same functional level); *Gray* v. *Shell Oil Co.*, 469 F.2d 742, 747 (9th Cir. 1972), *cert. denied,* 412 U.S. 943 (1973) (dictum that Section 2(b) defense was not foreclosed when competing petroleum supplier reduces price to retail dealer). *See also Bunty* v. *Shell Oil Co.*, 1972 Trade Cases (CCH) ¶ 74,252 (D. Nev. 1972) (price differences offered competitive dealers in the same area resulted from good faith effort to meet prices offered by Shell's competitors to their dealers).

[31] *See* pages 35-36, *infra.* Appellees slight the statutory interpretations of Section 2(b) by these two agencies by calling them "merely variant 'statements of policy'." Motion to Dismiss or Affirm, p. 19. These interpretations are the considered constructions of an important federal statute by two independent entities, and were evolved over a period of time. They cannot fairly be characterized as "ephemeral policy statements," nor as in conflict with the legislative history of the Robinson-Patman Act or this Court's interpretations of the Act. *Id.*

Under these circumstances, the Maryland Court of Appeals erred in construing Section 2(b) in accord with *Enterprise Industries* v. *Texas Co., supra.*

This Court has specifically left open the question of the circumstances in which the Section 2(b) "meeting competition" defense will be available to a seller if the seller's discriminatory price cut to its dealer ("buyer 1") is responsive to a price cut made by a competitor of a seller to its own dealer ("buyer 2"). *FTC* v. *Sun Oil Co.*, 371 U.S. 505, 512 n. 7 and 529 n. 19 (1963). However, the court below was not free to pick and choose among conflicting interpretations of Section 2(b) merely because this Court had not resolved the "difficult and important" question of "the scope and application of the section 2(b) defense." *FTC* v. *Sun Oil Co., supra,* 371 U.S. at 506. The court below should have followed the interpretation of Section 2(b) propounded by the higher and more recent federal court to consider the question, *i.e.*, the decision in *Bargain Car Wash, Inc.* v. *Standard Oil Co. (Indiana), supra.* This sound principle of orderly judicial administration is reinforced by this Court's command that "the construction of a statute by those charged with its execution should be followed unless there are compelling indications that it is wrong." *Red Lion Broadcasting Co.* v. *FCC,* 395 U.S. 367, 381 (1969). The Federal Trade Commission, which once embraced the *Enterprise* doctrine,[32] has abandoned that position, and reached the same conclusion as the Seventh Circuit in *Bargain Car Wash* in regard to the circumstances in

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[32] *Hearings on Gasoline Price War in New Jersey Before a Subcommittee of the Senate Select Committee on Small Business,* 84th Cong., 1st Sess., pt. 2, at 450-451 (1955).

which the Section 2(b) defense is available.[33] The Department of Justice has concurred in the Seventh Circuit's interpretation of Section 2(b) and has affirmed the Federal Trade Commission's position.[34] The court below therefore should have followed the lead of the two agencies charged with enforcement of the Act and of the highest federal court to consider the question.

B. Paragraph (d) of the Maryland Statute Conflicts with the Robinson-Patman Act, and Is Therefore Preempted.

The construction of paragraph (d) by the court below removes the seller's right to invoke the Section 2(b) "meeting competition" defense when the seller reduces a price to buyers to meet the equally low price offered by a competitor of the seller to a buyer.[35] By so

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[33] *The Federal Trade Commission's Report on Anti-competitive Practices in the Marketing of Gasoline*, 3 Trade Reg. Rep. (CCH) ¶ 10,373, at 18,245 (1967): "Consequently, we are of the opinion that a price reduction by one supplier to its customer which is reflected in the latter's retail price may be lawfully met by a comparable reduction by another supplier to its customer."

[34] *See* Department of Justice, *Report on the Robinson-Patman Act* 94 (1977).

[35] The Court below attempted to mask the conflict between paragraph (d) and Section 2(b) by asserting that "Paragraph D of the State Act encompasses only the situation where temporary price reductions are given to a dealer ["buyer 1"] to meet the lower price of a *competing dealer* ["buyer 2"] and, in our view, § 2(b) of the Federal Act does not extend to that situation." (App. A, p. 40a; emphasis in the original.) Of course, the federal Act did not extend to this situation only because the court below interpreted its scope narrowly, in accordance with the *Enterprise* doctrine. The Attorney General of Maryland similarly seeks to mask this conflict by arguing that the court below did no more than proceed on the basis that as long as a seller's price differential is lawful and offered to any customer, the seller is protected by Section 2(b). Motion to Dismiss or Affirm, p. 16. Clearly, the crux of the question

narrowing the scope of the Section 2(b) defense, the decision below creates liability under paragraph (d) for the seller which has complied with Section 2(a). The scope of Section 2(b) has been considered by this Court to be an essential and integral element of the congressional plan embodied in the Robinson-Patman Act to promote overall price competition and avoid price inflexibility. *See Standard Oil Co.* v. *FTC*, 340 U.S. 231 (1951).

Changing the scope of the Section 2(b) defense interferes with and frustrates this congressional plan by prohibiting price discrimination even in a circumstance where Congress deemed it desirable.[36] Congress has fully expressed its policies in regard to the degree to which the national economy demands price competition and price flexibility in the Sherman Act, 26 Stat. 209 (1890), 15 U.S.C. §§ 1-7, as amended, and in the Clay-

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is what customer can be offered the differential, and the court below, by following *Enterprise*, eliminated seller's price differentials to one class of customers from the protection of Section 2(b).

[36] This is true notwithstanding the argument of the Attorney General of Maryland that the congressional purpose of Section 2(b) requires a "shared customer" interpretation. Motion to Dismiss or Affirm, p. 17. If this assertion were correct, this Court would not have found it necessary to leave open the question of the availability of the Section 2(b) defense in a non-shared customer situation, *FTC* v. *Sun Oil Co., supra*, 371 U.S. at 512 n. 7 and 529 n. 19. Moreover, there is no support for this assertion in the legislative history. Finally, it is patently incorrect to assert that the absence of a "shared customer" required by the *Enterprise* view, revives the so-called "conduit theory," rejected in *FTC* v. *Sun Oil Co., supra*, at 524. That situation arises only if, as is not true here, there is competition between an integrated entity and a pure retailer, rather than between several integrated entities. *Cf. FTC* v. *Sun Oil Co., supra*, at 512 n. 7, 522.

ton Act, 38 Stat. 730 (1914), 15 U.S.C. §§ 12-27, as amended by the Robinson-Patman Act.[37] The Maryland legislature has interposed itself into the area—price competition and protection of small businesses—where Congress has struck a balance of the competing interests.[38] Paragraph (d) disturbs that balance, and interferes with the congressional plan.

Thus, under the construction of Section 2(b) adopted by the court below, paragraph (d) is "an obstacle to the accomplishment and execution of the full purposes and objectives of Congress," and is therefore preempted. *Hines* v. *Davidowitz,* 312 U.S. 52, 67 (1941).

Moreover, even if this Court were to decide that the court below was correct in concluding that the *Enterprise* doctrine properly describes the reach of Section 2(b), paragraph (d) of the Maryland statute still directly conflicts with the Robinson-Patman Act in two important ways.

(1) *Geographic and Overall Extent of Price Differentials.* The Maryland statute requires all voluntary allowances or price differentials to be extended uniformly to all retail service station dealers throughout the state.[39] This Court has not only held that Section 2(b) of the Robinson-Patman Act does not require

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[37] *See also Report of the Attorney General's National Committee to Study the Antitrust Laws* 181 (1955).

[38] *See generally* Department of Justice, *Report on the Robinson-Patman Act* (1977).

[39] "Under Paragraph D if one dealer gets a voluntary allowance or rebate, all Maryland dealers of that brand of product will get the same allowance." Defendants' Memorandum in Support of Their Response and Opposition to Plaintiffs' Motions for Summary Judgment, p. 16.

uniform price reductions,[40] but further that Section 2(b) in fact prohibits uniform price reductions. Section 2(b), this Court has repeatedly stated, permits only price reductions designed to respond to individual competitive situations, *FTC* v. *A. E. Staley Mfg. Co.,* 324 U.S. 746, 753 (1945), or phrased another way, to protect "competitors in individual transactions." *FTC* v. *National Lead Co.,* 352 U.S. 419, 431 (1957).[41]

The conflict between these two provisions is clear.[42] Paragraph (d) of the Maryland statute demands a state-wide, uniform and blanket extension of price differentials which Section 2(b) of the Robinson-Patman

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[40] In *Standard Oil Co.* v. *FTC, supra,* 340 U.S. at 250, this Court stated: "There is, on the other hand, plain language and established practice which permits a seller, through § 2(b), to retain a customer by realistically meeting in good faith the price offered to that customer, without necessarily changing the seller's price to its other customers." The *Standard Oil* decision does not require uniform price differentiations to be extended to all customers under § 2(b). *See also Cadigan* v. *Texaco, Inc.,* 492 F.2d 383, 386 (9th Cir. 1974).

[41] In *FTC* v. *Sun Oil Co., supra,* 371 U.S. at 517, the Court said Section 2(b) "permits the seller to meet the price actually previously offered by a local competitor. It permits him to go no further" (*quoting* H.R. Rep. No. 2287, 74th Cong., 2d Sess. 16 (1936)).

See also Hampton v. *Graff Vending Co.,* 478 F.2d 527, 535 (5th Cir.), *cert. denied,* 414 U.S. 859 (1973); *Forster Mfg. Co.* v. *FTC,* 335 F.2d 47 (1st Cir. 1964), *affirmed after remand,* 361 F.2d 340 (1st Cir. 1966), *cert. denied,* 385 U.S. 1003 (1967); *Bargain Car Wash, Inc.* v. *Standard Oil Co. (Indiana), supra,* 466 F.2d at 1176; *Standard Motor Products, Inc.* v. *FTC,* 265 F.2d 674, 677 (2d Cir.), *cert. denied,* 361 U.S. 826 (1959); *Exquisite Form Brassiere, Inc.* v. *FTC,* 360 F.2d 492 (D.C. Cir. 1965), *cert. denied,* 384 U.S. 959 (1966).

[42] The Circuit Court for Anne Arundel County found this conflict so self-evident that it granted a motion made by the present appellants for summary judgment on this issue. (App. C, p. 51a.)

Act prohibits.[43] A state statute which is in direct and actual conflict with a federal statute, *Florida Lime and Avocado Growers, Inc.* v. *Paul,* 373 U.S. 132, 142-143 (1963), or one which makes compliance with it and a federal statute impossible, *Perez* v. *Campbell,* 402 U.S. 637, 652 (1971), cannot stand.[44]

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[43] The Maryland statute also conflicts with the policies of the Sherman Act. *See Report of the Attorney General's National Committee to Study the Antitrust Laws* 181 (1955):

> "For a seller constrained by law to reduce prices to *some* only at the cost of reducing prices to *all* may well end by reducing them to *none*. As the Federal Trade Commission recently recommended to Congress, 'The right to meet a lower price which a competitor is offering to a customer, when this is done in good faith, is the essence of competitive economy.' Anything less, we think, would move the price discrimination statute into irreconcilable conflict with the Sherman Act." (Emphasis in original.)

Cf. Standard Oil Co. v. *FTC, supra,* 340 U.S. at 250, where this Court stated:

> "There is nothing to show a congressional purpose . . . to compel the seller to choose only between ruinously cutting its prices to all its customers to match the price offered to one, or refusing to meet the competition and then ruinously raising its prices to its remaining customers to cover increased unit costs."

[44] *Cf. Shell Oil Co.* v. *Younger,* 1976-1 Trade Cases (CCH) ¶ 60,960 (N.D. Cal. 1976), *appeal docketed,* No. 76-2784 (9th Cir. Aug. 13, 1976), in which the District Court for the Northern District of California invalidated a California statute which permitted a seller to grant a lower price to meet the equally low price offered by a competitor to an individual customer only if the same price reduction was granted to all other purchasers competing with the customer to whom the lower price was granted. In effect, that statute required uniform price reductions as does the Maryland statute. The district court found the statute invalid because it frustrated the congressional purpose embodied in Section 2(b) of the Robinson-Patman Act to foster price competition and because it was in direct, actual conflict with the federal Act.

(2) *Injury to Competition.* Section 2(a) of the Robinson-Patman Act prohibits price differentials only where their effect may be substantially to lessen competition, to tend to create a monopoly, or to injure competition. Paragraph (d) of the Maryland statute prohibits price differentials without regard to effect on or injury to competition. The two acts conflict so directly that the state statute must be preempted. *Perez* v. *Campbell, supra.*

CONCLUSION

The Maryland statute at issue here violates the commerce clause. It intrudes into the area regulated by the EPAA. It also conflicts with both the EPAA and the Robinson-Patman Act. It is thus preempted. The court below erred with respect to all three of these questions. Accordingly, the judgment of the court below should be vacated, and the Maryland statute should be declared invalid.

Respectfully submitted,

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